THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2018-04238

BETWEEN

ZNS CONSTRUCTION COMPANY LIMITED

Claimant

AND

BALOU ENGINEERING CONSTRUCTION AND MAINTENANCE SERVICES LIMITED

Defendant

Before the Honourable Madame Justice Margaret Y Mohammed

Date of Delivery 1 April 2022

APPEARANCES

Mr Irshaad Ali instructed by Ms Nalini Bansee Attorneys at law for the Claimant

Mr Rajiv Katwaroo instructed by Mr Dipnarine Rampersad Attorneys at law for the Defendant

RULING

1. The Defendant has applied ("the Application") for relief from the sanction imposed by the order dated 22 March 2021 ("the March 2021 Order") and for an extension of time from 26 March 2021 to 7 April 2021, to reply to the request for information contained in the Claimant's letter dated 16 January 2019 ('the Claimant's letter").

2. In support of the Application are the affidavits of Mr Mark Wiggins, the Defendant's Senior Project Manager ("the Wiggins Affidavit") and Mr Rajiv Katwaroo, the Defendant's Attorney at law ("the Katwaroo Affidavit") which were both filed 1 April 2021. In opposition is the affidavit of the Claimant's Instructing Attorney, Ms Nalini Bansee filed 2 July 2021.

3. In the substantive matter, the Claimant alleged that the Defendant had entered into a contract with the National Infrastructure Development Company Limited ("the NIDCO") to design and refurbish the Maracas Bay Facility located at the Maracas Beach, Maracas Bay Village ("the Maracas Project"). Shortly thereafter, it entered into a subcontract agreement with the Defendant dated 7 August 2017 ("the Agreement"), to perform building works on the Maracas Project for $909,164.00. The Agreement outlined the scope of works that the Claimant was engaged to perform, specified its terms and was duly signed by the authorized servants and/or agent of both the Claimant and the Defendant. Relying on the Agreement, the Claimant commenced and completed the building works which were then approved and accepted by the Defendant and the NIDCO. The Claimant then submitted its invoices for payment to the Defendant, which were signed by the Defendant's servants and/or agents upon receipt.

4. The Claimant asserted that while it was performing the building works outlined in the Agreement, the Defendant requested that it perform additional works relative to the Maracas Project, which included the rental of equipment and the performance of additional civil works ("the variation works"). The variation works did not form part of the Agreement and the Defendant agreed at all material times that the Claimant would be provided with additional compensation for the performance of these works. The Defendant then issued instructions and approvals to the Claimant for the performance of these works, which included but were not limited to written site instructions signed by the servants and/or agents of the Defendant. After these variation works were completed by

the Claimant, it issued invoices for the work that it had undertaken and satisfactorily completed, which were then verified and approved by the Defendant's servants and/or agents. However, in breach of the Agreement, the Defendant failed to pay the balance of $772,522.20 which was due and owing to the Claimant for the completed works.

5. The Claimant asserted that it wrote several letters to the Defendant, including a pre-action protocol letter dated 2 August 2018 requesting payment of the outstanding monies, but to date the Defendant has neither responded nor paid the monies that are due and owing to it. It asserted further that as a result of the Defendant's breach of the Agreement and delay in paying the balance that is due and owing to the Claimant, its business has suffered considerable loss and damage.

6. The Defendant's Defence was that it was not indebted to the Claimant for the sum of $772,522.20; it had at all material times made full disclosure to the Claimant regarding its financial position and that its delay in payment was due to the non-payment of the NIDCO; the Claimant's claim was premature as it was brought before the expiration of the defect's liability period of 1 year, having sent the last invoice in February 2018; and the Claimant had failed to properly quantify the loss and damage it suffered.

7. The Defendant asserted that the works completed by the Claimant had been accepted on an interim basis, having regard to the defect liability period and the need to pay the Claimant on a monthly basis to ensure that it was able to meet its outgoing expenses. However, due to the improper work and delays caused by the Claimant, it had been forced to redo some of the work that had been completed by the Claimant and incur unplanned scaffolding costs at its own expense. As a result, it was still in the process of quantifying the value of its expenditure, which would in turn affect the balance that was due and owing to the Claimant. Further, the NIDCO has not issued any taking over certificates relative to the Maracas Project and as such it has not fully certified or accepted the works completed under

the Agreement, which is governed by the main contract. In fact, the said issues are currently before a Dispute Adjudication Board awaiting its determination and until same is provided, it would be unable to properly assess the work that was properly completed by the Claimant.

8. It was common ground that in determining the Application the Court must consider rule 26.7 CPR which provides:

> 26.7 (1) An application for relief from any sanction imposed for a failure to comply with any rule, court order or direction must be made promptly.
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> (2) An application for relief must be supported by evidence.
>
> (3) The court may grant relief only if it is satisfied that—
>
> (a) the failure to comply was not intentional;
>
> (b) there is a good explanation for the breach; and
>
> (c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions.
>
> (4) In considering whether to grant relief, the court must have regard to—
>
> (a) the interests of the administration of justice;
>
> (b) whether the failure to comply was due to the party or his attorney;
>
> (c) whether the failure to comply has been or can be remedied within a reasonable time; and
>
> (d) whether the trial date or any likely trial date can still be met if relief is granted.
>
> (5) The court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown.

9. It is settled law that the provisions in Rule 26.7 (1) to (3) CPR are the threshold requirements. Once a party is able to cross the said requirements the Court is then able to examine the factors set out in Rule 26.7 (4) CPR.

10. With respect to the threshold requirements, it was not in dispute that the Application was supported by the evidence of the Katwaroo Affidavit and the Wiggins Affidavit. Further, I am of the opinion that the Application was made promptly. Promptitude is ascertained by examining the delay between the time the party knew about the sanction and when it took steps to seek relief. According to the Katwaroo Affidavit, Mr Katwaroo only became aware of the sanction on 26 March 2021 when he received the signed copy of the March 2021 Order, as through his own inadvertence he had not seen the email correspondence between the Court and the Claimant's Attorney on 22 March 2021.

11. Mr Katwaroo filed the Application within 5 days of becoming aware of the sanction. In my opinion, the delay was not inordinate and the Application was made promptly.

12. I am also of the view that the failure to comply was not intentional on the part of the Defendant. According to Mr Wiggins, both he and Ms Joseph, the Defendant's agents had been working assiduously in preparing the requested information and he had believed that it could be completed and submitted by 26 March 2021. In anticipation of the timely submission of the requested information, Mr Wiggins had spoken with Mr Katwaroo a week prior and settled the format of the report, which was to be submitted to him for onward forwarding to the Claimant. However, both Mr Wiggins and Ms Joseph had some personal difficulties which caused some delay in the final preparation of the report and he only received the draft report on 26 March 2021. Upon reviewing the said report, he noted that there were errors with the figures when checked with the appropriation of the monies received from the NIDCO. He stated that the

accuracy of this information is imperative, especially in addressing the request made at items (a), (b) and (c) of the Claimant's letter and despite his best efforts he was unable to make the necessary corrections in time for submission on 26 March 2021 as ordered.

13. I now turn to the explanation for not complying with the order. It is settled law that what is required under this Rule is a good explanation but not an infallible one. I accept that a good explanation is relative based on the circumstances of the case.

14. The explanation for not meeting the deadline was set out in the affidavits of Mr Wiggins who explained that both he and Ms Joseph, the Defendant's Accounting Assistant were responsible for supplying the information requested in the March 2021 Order. Ms Joseph was responsible for collating the Defendant's internal data and cross-referencing it against the Claimant's invoices, while he cross-referenced that information with the Arbitrator's decision on the scope of works completed by the Claimant. Thereafter, Ms Joseph would prepare the draft report, which would then be finalized by him and submitted.

15. According to Mr Wiggins, both he and Ms Joseph had been working assiduously in preparing the requested information and he had believed that it could be completed and submitted by 26 March 2021. In anticipation of the timely submission of the requested information, he had spoken with Mr Katwaroo a week prior and settled the format of the report, which was to be submitted to him for onward forwarding to the Claimant. However, he had been unaware that Ms Joseph was not at work on 24 March and 25 March 2021, as she had been out on sick leave and he only became aware of same on the evening of 25 March 2021 when he called to inquire about the readiness of the draft report. During this conversation, Ms Joseph had assured him that she would be at work on 26 March 2021 and the draft report would be finished in time to meet the stipulated deadline. Upon receipt of the Ms Joseph's draft report, he

reviewed same and noted that there were errors with the figures when checked with the appropriation of the monies received from the NIDCO. He asserted that the accuracy of this information is imperative, especially in addressing the request made at items (a), (b) and (c) of the Claimant's request and despite his best efforts he was unable to make the necessary corrections in time for submission on 26 March 2021 as ordered.

16. I accept that the Defendant could have acted with more haste in order to meet the deadline set in the March 2021 Order. However, in my opinion the Defendants provided a good explanation for not complying with the March 2021 Order.

17. I now turn to whether the party in default has generally complied with all other relevant rules, practice directions, orders and directions. The Defendant submitted that it has generally complied with all other relevant orders of the Court in the past and when necessary it has made the appropriate applications to the Court for extensions, and in some instances, this would have been supported by the Claimant as the requests were reasonable and justified.

18. I am therefore satisfied that the Defendant has met the threshold requirements. However, that is not all, as the Defendant still has to satisfy the requirements under Rule 26.7 (4) CPR.

19. I will first deal with the interest of administration of justice. Furthering the overriding objective of the CPR is in the interest of the administration of justice. This entails keeping the parties on an equal footing and ensuring that resources are allocated proportionately to deal with this matter.

20. To keep the parties on an equal footing it is necessary to consider the prejudice to the parties. In my opinion, the greater prejudice would be to the Defendant if the relief from sanction is not granted, as it would be deprived of the opportunity of putting forward its defence in the

substantive claim and it would now be susceptible to an application by the Claimant for summary judgment for the claim in excess of $772,522.20. The Defendant would also be prevented from pursuing its counterclaim against the Claimant in the sum of $363,100.00 resulting in a loss of that figure.

21. On the other hand, any prejudice which the Claimant may suffer in the delay of his action proceeding can be compensated by the costs of the Defendant's Application and if the Claimant is successful at trial it can be compensated with interest as claimed.

22. The failure to comply was not due to the Defendant's Attorney, but was due to the Defendant's agents discovering errors in the report prepared in the last hour of the deadline set for its filing.

23. With respect to whether the failure to comply has been or can be remedied within a reasonable time, the evidence of Mr Katwaroo is that the Defendant provided the information by 7 April 2021. This is a short delay of twelve days which included two weekends and 3 public holidays. Therefore, the failure has been remedied. Finally, there is no trial date or likely trial date set so this is not a material consideration.

24. Having examined the totality of the factors under Rule 26.7(4), the scales tip in favour of granting the Defendant relief from sanction.

Order

25. The Defendant's Notice of Application dated 1 April 2021 is hereby granted.

26. The Defendant is relieved from the sanction imposed by the Order dated 22 March 2021.

27. The time for the Defendant to reply to the request for information as contained in the letter dated 16 January 2020 is extended from 26 March 2021 to 7 April 2021.

28. Each party will bear its own costs of the said application.

/S/ Margaret Y. Mohammed

Judge